Office Supreme Court, U.S.
FILED
FEB 28 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 881

FEDERAL PACIFIC ELECTRIC COMPANY AND GENERAL ELECTRIC COMPANY,
Petitioners,

v.

CITY OF KANSAS CITY, MISSOURI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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OCTOBER TERM, 1962

No.

FEDERAL PACIFIC ELECTRIC COMPANY AND GENERAL ELECTRIC COMPANY,

Petitioners,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled actions on November 6, 1962, severally reversing judgments of the United States District Court for the Western District of Missouri and remanding the cases to that court for further proceedings.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 310 F.2d 271. It is attached as Appendix A to this petition.

The opinion of the United States District Court for the

Western District of Missouri is reported at 210 F. Supp. 545, and is set out at R 32, and again at R 88.[1]

Jurisdiction

The judgments of the Court of Appeals for the Eighth Circuit (Appendices B and C) were entered November 6, 1962. A timely petition for rehearing was filed and was denied on November 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Whether there exists in the federal law some doctrine of "fraudulent concealment" which Congress impliedly intended to toll the four-year limitation period set forth in Section 4B of the Clayton Act (15 U.S.C., § 15b). The District Court answered the question "No", and the Court of Appeals, reversing and remanding, answered the question "Yes".

Statutes Involved

Clayton Act, Section 4 (38 Stat. 731, 15 U.S.C. § 15).

Suits by persons injured; amount of recovery.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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[1] References preceded by "R" are to the Record as printed for use of the Court below, ten copies of which have been filed here.

Clayton Act, Section 4B (69 Stat. 283, 15 U.S.C. § 15b).

Limitation of actions.

"Any action to enforce any cause of action under section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

Clayton Act, Section 5(b) (69 Stat. 283, 15 U.S.C. § 16 (b)).

Judgment in favor of Government as evidence; suspension of limitations.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title, is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Statement of the Case

The two actions which are the subject of this petition were commenced in the United States District Court for the Western District of Missouri to assert a claim for treble damages as authorized by Section 4 of the Clayton Act (15 U.S.C. § 15) allegedly resulting from a conspiracy to fix prices on specified types of electrical equipment in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The amended complaint against Federal Pacific Electric Company (No. 13709-1 in the District Court, No. 17117 in the Court of Appeals) seeks unspecified damages claimed to have resulted from the excessive price plaintiff allegedly paid for circuit breakers in 1954. (R 25)

The amended complaint against General Electric Company (No. 13710-2 in the District Court, No. 17118 in the Court of Appeals) involves power switching equipment and seeks unspecified damages claimed to have resulted from the excessive price plaintiff allegedly paid for that product in 1954. (R 79 and 80)

The complaints were filed on February 1, 1962, and alleged that government proceedings relating to the products which are the subject of the suit were commenced on February 16, 1960 as to circuit breakers (R 22) and on May 19, 1960 (R 77) as to power switching equipment. It is apparent, therefore, that at least five years elapsed between the time the claims are alleged to have accrued, and the time of commencement of government proceedings.

Both defendants filed motions to dismiss or for summary judgment, contending that the suits were barred by the four-year statute of limitations contained in Section 4B of the Clayton Act (15 U.S.C. § 15b). Plaintiff sought to avoid the express limitation contained in Section 4B by

claiming that the statute was tolled by the "fraudulent concealment" alleged in the amended complaints. Plaintiff thus argued that the statute did not begin to run until it discovered the existence of its alleged causes of action by reason of the commencement of government litigation in 1960. Plaintiff stated in open court that it was satisfied with the complaints and did not desire to amend. (R 29, 30)

The District Court sustained defendants' motions and entered judgments dismissing the complaints. The Court of Appeals reversed these judgments and remanded the cases for trial on the basis that a so-called doctrine of "fraudulent concealment" should be read into Section 4B. The Court said that under proper circumstances the limitation period would be tolled until the plaintiff, in the exercise of reasonable diligence, discovers, or should have discovered, the cause of action.

Prior to final judgment in the Court of Appeals the plaintiff had filed a petition for certiorari in this Court. A single petition was filed covering both cases. This petition was not ruled upon until after the opinion of the Court of Appeals had been rendered, which of course made the petitioning plaintiff the successful party. The present petitioners (joined by *amici curiae*, defendants in other electrical antitrust cases around the United States) opposed that petition as being premature. The petition was denied by order of this Court dated November 19, 1962. 371 U.S. 912.

REASONS FOR GRANTING THE WRIT

1. The Petition Presents An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

These cases involve an important and far-reaching question of federal law concerning the proper construction and application of Section 4B of the Clayton Act.[2] Since its enactment in 1955, that statute of limitations has not been construed by this Court. Prior to 1955 no federal statute of limitations governed antitrust damage litigation, and the courts therefore borrowed state limitation statutes. Section 4B, which establishes a fixed four-year statute of limitations for civil damage actions, applies to all private treble damage actions and to government single damage actions for violations of the antitrust laws. Because of this broad scope, construction and application of this statute will have an obvious impact on antitrust litigation affecting all areas of the business community.

The instant cases are two of the more than 1800 civil suits seeking treble damages against the electrical equipment manufacturing industry as a result of criminal indictments returned in the United States District Court for the Eastern District of Pennsylvania in 1960. Almost all of those 1800 cases assert, in part, claims which would be barred (along with other claims which would not be barred) by the four-year limitation period set out in Section 4B if that statute cannot be tolled. In practical terms, the question raised in all of the more than 1800 cases is whether

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[2] On February 7, 1963, in San Antonio, Texas, Judge Robson, on behalf of the special committee of judges formed at the recommendation of the Chief Justice of the United States, indicated that the question here presented is of such importance that the prevailing parties in courts below should join in seeking review by the Supreme Court.

treble damages can be claimed not only for four years but for periods of time extending back indefinitely. A number of the cases pending in District Courts other than for the Western District of Missouri claim damages extending back as far as thirty years.

This Court is aware of the magnitude of the problems raised in pretrial discovery in the litigation of these more than 1800 electrical equipment cases. The Chief Justice of the United States recommended that a special committee of judges consider the handling of these cases,[3] and they have initiated a national discovery program to ease the burden upon the federal judiciary. A proper disposition of discovery problems by the lower courts would be facilitated if this Court ruled definitively as to whether recovery is limited to the period prescribed by the statute. Should this Court decide that tolling is not available, the scope of many cases will be substantially reduced, thereby greatly easing the unprecedented pressure upon the federal courts.

Should the decision of the Court below stand, its holding that a federal doctrine of "fraudulent concealment" tolls Section 4B will open the floodgates for concealment allegations in every antitrust suit hereafter brought. This fact is not mere conjecture, as the present 1800 electrical equipment cases conclusively demonstrate. The staggering burden placed upon the federal judicial system if the decision below is to stand would not end, but rather would only begin, with this litigation. Hereafter trial courts would be required not only to conduct pretrial discovery as far back as a plaintiff chose to allege "fradulent concealment", but in each instance try the matter of "concealment" and "discovery" to determine the period of recovery.

The pending 1800 electrical cases are merely a current

[3] See New York Times, February 7, 1962, p. 1, col. 7.

illustration of the impact of the problem created by the decision below. In view of the more than 200 private antitrust actions commenced each year in the federal courts,[4] the importance for the administration of the federal judiciary of the decision to toll the statute is manifest. There is thus a paramount public interest in having this issue finally resolved.

This petition, on all counts, presents one of the most important and substantial questions to arise in recent years with respect to federal civil litigation.

2. There is A Substantial Diversity of Judicial Views on the Question Presented.

The opinion below is in conflict with an opinion of the United States District Court for the District of Utah, *Brigham City Corp.* v. *General Electric Company*, 210 F. Supp. 574 (D. Utah, 1962), and with an opinion of the United States District Court for the District of New Mexico, *Public Service Company of New Mexico* v. *A. B. Chance Company, et al.*, July 31, 1962, 1962 CCH Trade Cases, ¶ 70,551. Both of these cases held that Section 4B cannot be tolled by reason of a claim of fraudulent concealment. Interlocutory appeals from the Utah and New Mexico judgments, as well as an appeal from a decision of the United States District Court for the District of Colorado allowing tolling, were granted under 28 U.S.C. Section 1292(b) by the Court of Appeals for the Tenth Circuit and were heard together on January 11, 1963. No opinion has yet been handed down in these cases.

The opinion below also in is direct conflict with an opin-

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[4] Annual figures for the years 1957-1961 are given in *Annual Report of the Director of the Administrative Office of the United States Courts* 163 (1961). The figure for 1961 was 378.

ion of the United States District Court for the Northern District of Georgia. *Rinzler* v. *Westinghouse Electric Corp.*, Case No. 7427, October 30, 1962, not yet reported. The Georgia case was an action predicated upon alleged violations of the Robinson-Patman Act, and it was dismissed by the court on a finding that Section 4B could not be tolled. An appeal from the Georgia case has been taken to the United States Court of Appeals for the Fifth Circuit. In addition, that Court has permitted an interlocutory appeal from a decision of the United States District Court for the Western District of Texas, sustaining tolling of the statute of limitations. Both of these appeals are pending and no date has as yet been set for oral argument.

The United States Court of Appeals for the Second Circuit has handed down an opinion permitting tolling, *Atlantic City Electric Company* v. *General Electric Company*, December 31, 1962, 1963 CCH Trade Cases ¶ 70,604. Judge Moore filed a strong dissent. We are advised that a petition for writ of certiorari will be filed promptly in this case.

An interlocutory appeal has been allowed from a judgment of the United States District Court for the Northern District of Illinois permitting tolling (*Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 210 F. Supp. 557 (N.D. Ill. 1962)) and was argued in the Court of Appeals for the Seventh Circuit on February 11, 1963.

Interlocutory appeal has also recently been granted by the Court of Appeals for the Ninth Circuit with respect to a decision permitting tolling in the Southern District of California. *City of Los Angeles* v. *Allis-Chalmers Manufacturing Company, et al.*, January 8, 1963, 1963 CCH Trade Cases, ¶ 70,651.

All district courts which have passed on the question

have found that there are "substantial grounds for difference of opinion" on the question presented, so as to permit interlocutory appeal. Moreover, this diversity of opinion and the varying stages of decision in many of the circuits demonstrate the necessity for a definitive, nationwide decision by this Court of the question presented.

3. This Important Federal Question Was Not Correctly Decided By The Court Below And Its Decision Conflicts With Principles Established By This Court.

Congress has unquestioned power to enact statutes of limitation which are absolute and not subject to tolling for any reason. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356 (1943). The intent of Congress is and must be controlling.

In Sections 4B and 5(b) of the Clayton Act, Congress has used the clearest and most emphatic language possible to express its intent absolutely to bar recovery of all causes of action either four years after they have accrued or after the period of suspension (incident to pending government proceedings) specifically provided. Section 4B states:

> "Any action to enforce *any* cause of action . . . shall be *forever barred* unless commenced within four years after the cause of action accrued."[5]

Plain language in a statute of limitations leaves nothing for construction. *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59, 64 (1953). This is especially true in the case of statutes which are penal in character and therefore must be strictly construed. *Huntington* v. *Attrill*, 146 U.S. 657 (1892). Section 4 of the Clayton Act

[5] In all quoted passages, emphasis is supplied unless otherwise noted.

has been so characterized. *Commissioner* v. *Glenshaw Glass Company*, 348 U. S. 426 (1955). Moreover, the 1955 amendments to the Clayton Act are not silent on the subject of tolling, but rather permit tolling in one, and only one, specific situation. Thus, Section 5(b) provides that if enforcement proceedings are commenced by the United States within the four-year period established by Section 4B, the time bar shall be suspended during the pendency of such enforcement proceedings and for one year thereafter:

> ". . . whenever the running of the statute of limitations . . . is suspended hereunder [by reason of government enforcement proceedings], any action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

This express exception is inconsistent with a finding of implied exceptions and shows that Congress intended tolling only in that specified circumstance. *Soriano* v. *United States*, 352 U.S. 270 (1957).

The Court of Appeals held, however, that Section 4B can be tolled pursuant to a supposed federal judicial tolling doctrine if a defendant "fraudulently conceals" the antitrust violation which is the basis of the claim.

While the clear language of Sections 4B and 5(b) alone seems sufficient to establish that Congress manifested its intent not to have any judicial tolling doctrine read into the statute, petitioners have not and do not rest on that manifestation of Congressional intent alone. The fact is that, on its way to the adoption of the 1955 statute of limitations, Congress gave prolonged consideration to the problem of the potential treble damage plaintiff from whom a cause of action has been concealed. Congress, nonethe-

less, repeatedly rejected bills providing for the tolling of the period of limitation until discovery in the exercise of due diligence of the cause of action in conspiracy cases. In attempting to cope with that legislative history, the Court below fell into three significant errors, with the result that it reached a decision wholly at odds with the Congressional intent. First, the Court misapprehended the state of the decisional law during the period of the Congressional deliberations. Second, the Court misunderstood the nature and purpose of the tolling provisions which Congress considered and rejected. Third, the Court permitted the last minute statements of two Congressmen (Representatives Patman and Celler) to outweigh the obvious meaning of six years of legislative history in both Houses, including the committee reports.

As to decisional law, the Court erroneously assumed the existence of a federal doctrine of "fraudulent concealment." It viewed the supposed doctrine as dating back to *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342 (1875), and thereafter as read into every federal statute of limitations by the decision of this Court in *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). From this erroneous assumption, the Court below mistakenly concluded that "Congress was presumptively aware of the [supposed 'fraudulent concealment'] doctrine" and must have intended it to govern the new antitrust limitation. This misconception wholly distorted the Court's approach to the legislative history of Section 4B and erroneously placed upon the defendants the burden of establishing an express Congressional disclaimer—in just so many words—of an actually non-existent federal doctrine.

Contrary to the interpretation by the Court below, the *Bailey* line of cases enunciates an equitable tolling doctrine of "discovery" applicable only to fraud cases; that

is, cases where the gravamen of the cause of action is fraud. Both the *Bailey* and *Holmberg* cases and a long line of Supreme Court decisions applying the *Bailey* fraud doctrine were suits to redress injuries caused by fraud.[6] These cases specifically state that when "fraud . . . is the foundation of the suit" (88 U.S. at 349) and a plaintiff remains in ignorance of the fraud, without any fault or want of diligence or care on his part, then

> ". . . the bar of the statute does not begin to run until the *fraud is discovered*, though there be no special circumstances or efforts on the part of the party committing *the fraud to conceal it from the knowledge of the other party.*" 327 U.S. at 397

Examination of the very judicial authority upon which the Court below relied establishes that no such tolling rule as the supposed doctrine of "fraudulent concealmment" had been applied as a matter of federal law to an antitrust action through 1955, when Congress enacted Section 4B, and therefore Congress could not have intended the doctrine to apply by implication. To the contrary, in *Moriccolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 84 (2d Cir. 1961), one of the cases principally relied upon by the Court below, another Court of Appeals stated that neither its research nor that of the parties revealed a case decided by this Court or any Court of Appeals which had theretofore, prior to 1961, held the *Bailey* line of cases applicable to a federal cause of action "at law", antitrust or otherwise.[7]

In fact, in two instances prior to consideration by Con-

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[6] *E.g., Exploration Co.* v. *United States*, 247 U.S. 435 (1918); *Rosenthal* v. *Walker*, 111 U.S. 185 (1884); *Tracy* v. *Clews*, 115 U.S. 528 (1885); and *United States* v. *Diamond Coal & Coke Co.*, 255 U.S. 323 (1921).

[7] The Court in *Moriccolor*, however, did read *Bailey* as establishing a tolling doctrine labeled "concealment of the wrong." 288 F.2d at 82, 83.

gress of a federal statute of limitations in the antitrust field, when plaintiffs attempted to extend the *Bailey* fraud doctrine to an antitrust treble damage action, such extension was rejected. *State of Oklahoma ex rel. Phillips* v. *American Book Co.*, 144 F. 2d 585 (10th Cir. 1944), and *Burnham Chemical Co.* v. *Borax Consolidated Ltd.*, 170 F.2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924, *rehearing denied*, 336 U.S. 955 (1949). In the latter case, the plaintiff in his petition to this Court for a writ of certiorari specifically urged that the *Bailey* fraud doctrine should be extended to antitrust actions. After certiorari was denied in the *Burnham* case, proponents of such a tolling provision turned to Congress in 1949, and thereafter, to write into the proposed federal statute of limitations a discovery proviso patterned identically after the long-standing fraud doctrine, but to apply solely to conspiracy cases.

In 1949, bills were introduced in the House and Senate establishing an antitrust statute of limitations (H.R. 4985; S. 1910). Each bill contained a provision that in causes of action based upon conspiracy, the statute would not begin to run until the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the conspiracy. Bills with similar provisos were also introduced in 1950 (H.R. 7905) and in 1951 (H.R. 1986). These were the so-called "discovery provisions" which the Court below recognized were rejected by Congress after lengthy hearings.[8]

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[8] Hearings on S. 1910 Before a Subcommittee of the Committee on the Judiciary, United States Senate, 81st Cong., 1st Sess. (1949) (hereinafter called Senate 1949 Hearings); Hearings Before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives, 81st Cong., 2d Sess., Ser. 14, Pt. 5, 1950 (hereinafter called House 1950 Hearings); Hearings Before the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary, House of Rep., 82nd Cong., 1st Sess., Ser. 1, Pt. 3, 1951 (hereinafter called House 1951 Hearings).

The Court below, however, misconceived the significance of the rejection of these discovery provisos, viewing them as different in substance from the "fraudulent concealment" doctrine said to be established by *Bailey*. This analysis is defective in two major respects. First, as demonstrated above, the doctrine of *Bailey* is a fraud-discovery doctrine and it is quite obvious that the proponents of the discovery provisos were attempting, by legislation, to extend this fraud-discovery rule into the non-fraud field of antitrust damage actions. For example, Thurman Arnold, former chief of the Antitrust Division of the Department of Justice, testified that the purpose of the bills was to invoke "the ordinary rule of equity that the statute should not run on fraud until the discovery [of the cause of action]." Senate 1949 Hearings at 6-7. Joseph W. Burns, an opponent of the provisos and later legal counsel to the Senate Judiciary Committee when Section 4B was passed in 1955, stated: "What Mr. Arnold is trying to do is to have this type of action [antitrust conspiracy] called a fraud action so that all rules with respect to fraud actions which have been built up over hundreds of years to meet a particular situation would be applied to this type of action for which they were never intended." Senate 1949 Hearings at 56.

The provisions were unequivocally rejected by both the Senate and House as unworkable and contrary to the purpose of enacting a uniform statute of repose in the antitrust laws. Opponents convinced Congress that "In the fraud field experience has indicated that the discovery provision does not operate smoothly or happily. It injects this element of uncertainty when the fraud has been discovered."[9] The entire legislative history demonstrates, *inter alia*, that Congress, in rejecting the discovery provisos, was specifically rejecting an extension of the *Bailey*

[9] Professor Milton Handler, House 1950 Hearings at 21.

fraud-discovery doctrine into the non-fraud field of anti-trust conspiracy.

Secondly, the opinion below is utterly unjustified in the assertion that Congress, in rejecting the conspiracy discovery provisos of the cited bills, nevertheless intended to maintain and preserve a purported, but actually non-existent, judicial tolling exception labeled "fraudulent concealment". In the first place, there is no support in the cases for any such federal tolling doctrine.[10] That this was the understanding of Congress is evidenced by the fact that, even after this Court's decision in *Holmberg*, when Congress has sought to toll a statute of limitations in actions which by their very nature are shrouded in secrecy or can under normal circumstances be expected to be concealed, it has expressly so provided.[11]

The legislative history shows, moreover, that Congress, in considering and rejecting the arguments of the proponents of the discovery provisos, did not intend to make any exception to its rejection of the tolling-until-discovery concept. Witnesses and Congressmen repeatedly pointed out the difficulty of discovering concealed conspiracies and the need for legislative enactment of the rejected discovery provisions so that "a plaintiff may [not] lose his day in court because the defendants have succeeded in conceal-

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[10] As previously noted, at least until 1961, more than five years after the enactment of Section 4B, no appellate court had even suggested that the federal doctrine of *Bailey* was a fraudulent "concealment" rule applicable to a non-fraud cause of action. Such a suggestion was first asserted, and then only by way of *dictum*, in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961).

[11] For example, with reference to forged or altered checks, Congress has provided that, "If any endorser . . . shall fraudulently conceal the cause of action from the knowledge of the United States . . . the action may be commenced at any time within two years after the United States . . . shall discover . . . such a cause of action although such action would be otherwise barred by the provisions of sections 129-131 of this title." 31 U.S.C. § 131.

ing their conspiracy from outsiders."[12] As this Court observed in *Grunewald* v. *United States*, 353 U.S. 391, 402 (1957), conspiracies are necessarily secret and accompanied by efforts to cover the conspirators' traces.

The Court below apparently held that the legislative history is not convincing because the rejection was of a concept which the Court deemed to be entirely different from "fraudulent concealment": "... Congress itself recognized the difference between failing to discover and fraudulent concealment." This notion is plainly wrong; its only support is drawn from the label "discovery", inartfully adopted by the proponents of the conspiracy tolling provisions. It is perfectly clear that Congress was *not* dealing with simple discovery, *i.e.*, with cases in which there is no conspiracy or other concealment on the part of the defendants causing non-discovery but nevertheless the injured party is unaware of the violation. Had Congress directed its attention to such simple discovery, the limitation of the provisos to conspiracy, their requirement of due diligence, and all the discussions during the hearings regarding concealment of causes of action would have been meaningless and irrational.

Alternatively, it is possible that the Court below in disregarding the rejection by Congress of the conspiracy discovery provisos, was drawing a distinction between "active" concealment (called "fraudulent concealment") and self-concealment.[13] Pursuant to such a rationale, the Court's decision would permit tolling where defendants actively conceal from a plaintiff his cause of action but not

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[12] Senate 1949 Hearings, 6-7, 19; House 1950 Hearings 25, 45, 59-60, 65; House 1951 Hearings, 100; 96 Cong. Rec. 10442 (1950).

[13] The opinion below states, ". . . we are satisfied that there is a marked difference in tolling the statute of limitations because of the failure to discover, and tolling the limitation period because the parties who engaged in unlawful conduct (conspiracy or combination) are successful through *affirmative action, in concealing* the cause of action itself."

where the plaintiff's failure to discover is the result of the inherently self-concealing character of the cause of action. But any such alternative ground of decision is equally fallacious. It was the entire concept of concealment—applied in cases of both actively concealed conspiracies as well as inherently secret conspiracies—which Congress rejected. Any such distinction between "active concealment" and "self-concealment" would charge Congress with the absurdity of intending to permit tolling only in the event of an actively concealed conspiracy, while rejecting tolling provisions for a conspiracy which is inherently secret and so well set up that no particular steps are needed to cover the conspirators' traces.[14] Such a distinction is without support in judicial precedent or in the legislative history.

The only other aspect of the legislative history referred to by the Court below is a colloquy between Representatives Patman and Celler, which took place on a day when there was no roll call and when the only recorded vote in the House showed forty-six members to be present. Mr. Celler stated that in conspiracy cases "the statute of limitations only runs from the time of discovery."[15] Mr. Celler thus said in effect that the very discovery provisos for conspiracy cases, which had been rejected by Congress, were nevertheless to be read into the statute. He spoke only of discovery of conspiracy, without any mention of concealment. In no way did Mr. Celler allude to the requirement of "fraudulent" con-

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[14] Judge Christensen stated in *Brigham City Corp. v. General Electric Co.*, 210 F. Supp. 574, 577 (D. Utah, 1962): ". . . these [self-secreting conspiracies] may be the ones in practice that prove the most effective, predatory, far reaching and damaging." Quite obviously, an inherently secret conspiracy which is so well set up that no steps need be taken to cover up the conspirators' traces would probably be equally as hard to discover as would be a conspiracy with traces which must be hidden by further acts of the wrongdoers.

[15] 101 Cong. Rec. 5128, 5133 (1955).

cealment found by the Court below. In relying upon this colloquy, the Court below ignored the teachings of this Court that such statements by individual Congressmen, particularly those who seek to revive rejected legislation, are not indicative of the intent of Congress. *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184 (1913); *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

Furthermore, the Court below failed to consider the committee reports relating to H.R. 4954. It was the bill containing the 1955 amendments to the antitrust laws and was enacted without amendment, even though Representative Patman persisted, after his colloquy with Representative Celler, in urging an amendment applicable to all antitrust causes of action so that "the period of limitations shall not commence to run until at least covert wrongs have been discovered."[16] Both the House and Senate committee reports contain extensive discussions of tolling and neither suggests that any tolling situation is to be recognized other than the one specifically set out in the statute. *Cf. Soriano* v. *United States*, 352 U.S. 270 (1957). Both reports make it emphatically clear that an absolute time bar which commences at the time the cause of action accrues or within one year after the government case is concluded would best serve the policy underlying the enforcement of the antitrust laws:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims.

[16] 101 Cong. Rec. 5132-5133 (1955).

> unduly impair efficient business operations, and overburden the calendars of courts. It believes the provisions of this bill will *tend to shorten* the period over which private triple damage cases will extend by *requiring* that the plaintiff bring his suit *within 4 years* after it *accrued* or within 1 year after the Government's case has been concluded.
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> . . . . . .
>
> "... [The Committee] does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcement of the antitrust laws." H.R. Rep. No. 422, 84th Cong., 1st Sess. (1955) at 8-9.[17]

There is simply no basis for the assertion in the opinion below that Congress assumed that the limitation set out in Section 4B would be subject to tolling for "fraudulent concealment". Quite the contrary, Congress could only have acted under the assumption that, in adding an internal limitation covering causes of action created by the Clayton Act, no tolling situations would be recognized except the one which it chose to express.[18] There are also serious difficulties in applying a tolling doctrine of equitable origin to an

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[17] See also S. Rep. No. 619, 84th Cong., 1st Sess. (1955) at 6.

[18] See the unanimous opinion in *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 346 (1943), involving a federal statute of limitations added by amendment to replace state statutes of limitation which had previously been borrowed. A like rule has also been applied by Courts of Appeals. See, for example, *United States ex rel. Nitken* v. *Dawes*, 151 F. 2d 639 (7th Cir. 1945), *cert. denied*, 327 U.S. 788 (1946), holding that the statute of limitations under the False Claims Act could not be extended by a claim of fraud; *United States* v. *Borin*, 209 F. 2d 145 (5th Cir. 1954), holding that *Holmberg* v. *Armbrecht*, *supra*, did not support the tolling of the statute of limitations under the False Claims Act.

action for treble damages.[19] The legislators must necessarily have assumed that the statute would be tolled only where the statutory language says it can be and not otherwise.

It is manifest that Congress gave full consideration to the question whether there should be tolling under the circumstances alleged to exist in the present complaints and concluded that there should not be. The Court below erred in adding something to the statute which is not there and was not intended to be there.

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[19] Tolling doctrines of equitable origin are extremely inappropriate in treble damage actions such as these. In *Marshall* v. *Vicksburg*, 82 U.S. 146 (1873), this Court said at page 149:

> ". . . Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, *or anything in the nature of either* . . ."

See also, *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447 (1855); *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916) (holding that treble damages under the antitrust laws cannot be recovered in an equitable action). The Court below obviously ignored these holdings in its conclusion that Section 4B is subject to tolling by reason of an equitable doctrine.

Conclusion

For the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Dated: February 28, 1963.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 17,117 and 17,118

CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION, *Appellant*,

vs.

FEDERAL PACIFIC ELECTRIC COMPANY, *Appellee*.

CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION, *Appellant*,

vs.

GENERAL ELECTRIC COMPANY, *Appellee*.

Appeals from the United States District Court for the Western District of Missouri

[November 6, 1962]

Before JOHNSEN, Chief Judge, and MATTHES and RIDGE, Circuit Judges.

MATTHES, Circuit Judge.

On February 1, 1962, the City of Kansas City, Missouri, filed two suits in the United States District Court for the Western District of Missouri seeking to recover treble damages under § 4 of the Clayton Act for alleged violations of § 1 of the Sherman Act.[1] The amended complaint

[1] § 4 (15 U.S.C.A. § 15) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

in each case was predicated upon an actionable combination and conspiracy, alleged to have been in existence since as early as 1948, and which resulted in damage to plaintiff only in 1954 when defendants allegedly overcharged plaintiff for certain electrical equipment. It was specifically alleged that defendants, through affirmative conduct, had fraudulently concealed the existence of the conspiracies from plaintiff and that plaintiff did not learn of the illegal combinations until after the United States had commenced criminal and civil proceedings against defendants in 1960.[2] Defendants do not challenge the sufficiency of the fraudulent concealment allegation.

The district court sustained defendants' motions to dismiss the complaints or, in the alternative, for summary judgment on the ground that the complaints as amended showed on their face that the claims, if any, upon which plaintiff's causes of action purported to be based, accrued more than four years prior to the date of the filing of the complaints, and more than four years prior to the date that any tolling provision contained in the Clayton Act

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respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

§ 1 of the Sherman Act (15 U.S.C.A. § 1) provides in summary that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade shall be illegal.

[2] In summary, the fraudulent concealment paragraphs of the complaints alleged that from the inception of the conspiracies in 1948 until at least 1960, defendants used such active means and methods to conceal the conspiracies as secret meetings held throughout the country, the use of public pay telephones, calls made to residences of company representatives rather than to their offices, the use of plain envelopes without return addresses, and the concealment or destruction of records relating to the conspiracies. Plaintiff further alleged that during the conspiracies, defendants used an intricate "phase of the moon" formula and code numbers as a means to rig price quotations and bids to purchasers, including plaintiff, while maintaining an outward appearance of competition. Plaintiff concluded that defendants' deliberate acts of concealment prevented plaintiff, even by the exercise of reasonable diligence, from learning of the conspiracies until after the institution of the Government proceedings.

became operative.[2] These actions are before the court on appeal from the district court's judgments dismissing both cases.[3] The important and broad issue to be resolved is whether plaintiff's actions are barred by the provisions of § 4B of the Clayton Act (15 U.S.C.A. § 15b),[4] which reads as follows:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

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[3] The trial court was not entirely free from doubts as to the correctness of its ruling, and stated in its memorandum opinion that "[a]t this district court level, and in the present state of the authorities, the question could honestly be decided either way. In fact, the decisions of the district courts on the general question have been conflicting. In order to hasten the full review of the legal questions by the highest court by which they are reviewable, this Court has decided to sustain both the motion to dismiss and the motion for summary judgment. • • •."

The actions were separately treated in the lower court; separate judgments were entered, and separate notices of appeal were filed. Both cases present the identical question. In this court the parties treated them as one case. Accordingly, we dispose of both with one opinion.

[4] § 5B of the Clayton Act (15 U.S.C.A. § 16b), enacted at the same time as § 4B and indirectly related to this case, provides:

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Resolution of this question, as all parties agree, calls for an interpretation of the foregoing statute.[5]

We are mindful of the fundamental principle that a court should not engage in interpreting or construing a statute that is clear and unambiguous on its face. Only those statutes which are ambiguous or of doubtful meaning are subject to the process of statutory interpretation. *Packard Motor Car Co.* v. *National Labor Relations Board* (1947), 330 U.S. 485, 492, and Sutherland, Statutory Construction, Vol. 2, § 4502 (3d Ed. 1943). Here the controversy centers upon the meaning of the phrase "within four years after the cause of action accrued." More precisely, did Congress intend that the federal doctrine of fraudulent concealment should be read into § 4B so that the limitation period of four years would be suspended and tolled until the injured party, by the exercise of reasonable diligence, discovers that his rights have been invaded?

Before delving further into this question, however, and as explanatory matter, we observe that during the period between 1914, when the Clayton Act became the law, and 1955 when § 4B was enacted, state statutes of limitation were resorted to in actions brought under the Clayton Act.[6] The disparity in the state statutes (varying between one and twenty years) promoted "forum-shopping" and finally resulted in an awareness of the need for a federal limitation period that would provide uniformity throughout the United States. Congress provided the

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[5] Some authorities distinguish between "interpretation," determining the meaning of words, and "construction," determining the application of words to the facts in litigation. Sutherland, Statutory Construction, Vol. 2, § 4504 (3d Ed. 1943) and 50 Am.Jur., Statutes, § 218, p. 197, point out that the words are often used interchangeably and without distinction, and we will follow that course throughout this opinion.

[6] *Moviecolor Limited* v. *Eastman Kodak Company* (2 Cir., 1961), 288 F.2d 80, cert. den. 368 U.S. 821; Grant W. Wiprud, Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles, 57 Northwestern University Law Review 29, 32 (1962); House Report No. 422, 84th Cong., 1st Sess. [to accompany H.R. 4954] pp. 1, 6, 7 (1955); Senate Report No. 619, 84th Cong., 1st Sess. [to accompany H.R. 4954] pp. 4, 5 (1955).

remedy by enacting § 4B on July 7, 1955, effective on January 7, 1956. But a final solution was not easily attainable. As we shall note, infra, district courts are not in accord as to construction and application of § 4B. It also appears that subsequent to the time the Government proceedings were instituted against certain manufacturers of electrical equipment, and apparently as a result of those proceedings, 1700 or more civil actions, including the instant cases, have been instituted and are pending against such manufacturers in the district courts throughout the country, and we are informed that the outcome of those cases is in part dependent upon the judicial interpretation of § 4B. The Second Circuit considered the effect of the doctrine of fraudulent concealment upon a state statute of limitations applicable to a private antitrust suit under the Clayton Act in *Moviecolor Limited* v. *Eastman Kodak Company*, supra, 288 F.2d 80. However, the precise question before us, to our knowledge, has not as yet received judicial interpretation by a court of appeals.

Because of the importance of the question, we permitted Kansas City Power & Light Company, Missouri Public Service Company, St. Joseph Light & Power Company, Kansas Power & Light Company, Kansas Gas & Electric Company, Western Light & Telephone Company, Inc., The Empire District Electric Company, and Central Kansas Power Company to file a brief as amici curiae; and Union Electric Company to file a brief as amicus curiae.[7]

It is neither necessary nor expedient to enumerate and give consideration to the numerous canons of construction to be applied in interpreting or construing a statute. The legislative will is the all-important or controlling factor, and has been said to be the vital part, the heart, soul, and essence of the law. 50 Am. Jur., Statutes, § 223, p. 200.

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[7] The amici curiae above named have suits pending in the Western District of Missouri before Honorable William H. Becker, who decided this case, and apparently Judge Becker has indicated that he will rule the limitation issue in conformity with the result reached in this case. Union Electric Company has 8 suits pending in the Eastern District of Missouri in which the question of the statute of limitations is an issue. The briefs thus filed support the position of the plaintiff herein.

See also *United States* v. *Congress of Industrial Organization* (1948), 335 U.S. 106, 112, 113; *United States* v. *Cooper Corporation* (1941), 312 U.S. 600, 605, 606.

In searching for the will and intent, it is to be assumed that Congress was aware of established rules of law applicable to the subject matter of the statute and thus, upon enactment, the statute is to be read in conjunction with the entire existing body of law. 50 Am. Jur., Statutes, § 339, pp. 331, 332; *Exploration Company* v. *United States* (1918), 247 U.S. 435, 449; *United States* v. *McElveen* (E.D. La. 1959), 177 F.Supp. 355, 358, 359. In our view, this rule is of particular significance here because, as noted, infra, the fraudulent concealment doctrine, firmly established in *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, and adhered to in subsequent cases, was actually the subject of discussion by members of the Congress before § 4B was enacted in its present form.

The landmark case on fraudulent concealment is *Bailey* v. *Glover*, supra, 88 U.S. (21 Wall.) 342, where the Supreme Court was required to determine whether the limitation statute of the Bankruptcy Act of 1867, providing that suit be brought within two years "from the time the cause of action accrued," had been tolled by the concealment of the fraudulent conduct which was the basis of the cause of action. A unanimous court made these pertinent pronouncements:

> "We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." 88 U.S. at p. 348.

* * * * * * *

"But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side." 88 U.S. at p. 349.

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"* * * we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." 88 U.S. at pp. 349, 350.

Shortly after the opinion was rendered in *Bailey* v. *Glover*, supra, 88 U.S. (21 Wall.) 342, it was recognized and followed in *Rosenthal* v. *Walker* (1884), 111 U.S. 185, 190, and *Traer* v. *Clews* (1885), 115 U.S. 528, 537, which also involved the bankruptcy statute of limitations. Although we deem it unnecessary to trace the entire development of the fraudulent concealment doctrine, we shall briefly discuss the more significant cases.

Exploration Company v. *United States*, supra, 247 U.S. 435, an action to cancel certain patents, was instituted more than six years after the date of the issuance of the patents. The Supreme Court held that the action was not barred by the statute of limitations, which provided, "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

In *Exploration*, as here, the contention was that under the clear language of the statute, all actions were barred unless commenced within six years from date of the issuance of the patent, regardless of the Government's diligence in attempting to discover the fraud. In disagreeing with this contention, the court observed that the true rule is established in federal jurisprudence by the decision in *Bailey* v. *Glover*, supra, 88 U.S. (21 Wall.) 342, which had never been overruled nor modified "in this court and has been approved and followed." (Citing cases). 247 U.S. at p. 448. The court also observed:

> "When Congress passed the act in question the rule of *Bailey* v. *Glover* was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind. We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the Government." 247 U.S. at p. 449.

Holmberg v. *Armbrecht* (1946), 327 U.S. 392, was a suit in equity to enforce the liability imposed upon shareholders of a Joint Stock Land Bank by § 16 of the Federal Farm Loan Act equal to one hundred percent of their holdings. The bank closed in May, 1932, and it was alleged that it was not until 1942 that petitioners learned of the concealment of the ownership of the stock by defendant. There was no federal statute of limitations and the court was confronted with the New York statute of

limitations which barred such an action after ten years. The Court, discussing at some length the fraudulent concealment doctrine and its applicability to a federal case where a state statute of limitations is invoked, made this pertinent observation in the course of the opinion:

> "* * * And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' *Bailey* v. *Glover*, 21 Wall. 342, 348; and see *Exploration Co.* v. *United States*, 247 U.S. 435; *Sherwood* v. *Sutton*, 5 Mason 143.
>
> "*This equitable doctrine is read into every federal statute of limitation.* If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. *Bailey* v. *Glover*, supra; *Exploration Co.* v. *United States*, supra; *United States* v. *Diamond Coal Co.*, 255 U.S. 323, 333." (327 U.S. at p. 397). (Emphasis supplied).

The federal doctrine of fraudulent concealment, authoritatively recognized in many state jurisdictions, is discussed in 34 Am.Jur., Limitation of Actions, § 231, p. 187, where, after noting the reluctance of courts to acknowledge exceptions to a statute of limitations, this declaration appears:

> "According to the majority rule, however, fraudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the

> running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action; under this rule, one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered." 34 Am.Jur. 188.

See also, Annotation, 173 A.L.R. 578.

The doctrine as announced in *Bailey* v. *Glover*, supra, 88 U.S. (21 Wall.) 342, has been applied or recognized in private antitrust cases which were filed prior to the enactment of § 4B or which involved causes of action which accrued prior to the enactment of said statute. *Moviecolor Limited* v. *Eastman Kodak Co.* (2 Cir. 1961), 288 F.2d 80, cert. den. 368 U.S. 831; *Crummer Co.* v. *Du Pont* (5 Cir. 1958), 255 F.2d 425, cert. den. 358 U.S. 884; *American Tobacco Co.* v. *People's Tobacco Co.* (5 Cir. 1913), 204 F.58; *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.* (N.D. Ala. 1960), 197 F.Supp. 333; *Klein* v. *Lionel Corp.* (D. Del. 1955), 130 F.Supp. 725; *Winkler-Koch Engineering Co.* v. *Universal Oil Prod. Co.* (S.D. N.Y. 1951), 100 F.Supp. 15. And cf. *Suctow Borax Mines Consol.* v. *Borax Consolidated* (9 Cir. 1950), 185 F.2d 196, 209, cert. den. 340 U.S. 943, and *Burnham Chemical Co.* v. *Borax Consolidated* (9 Cir., 1948), 170 F.2d 569, cert. den. 336 U.S. 924. See also Wiprud, Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles, 57 N.W. U.L. Rev. 29, 48-50 (1962).

Not only was Congress presumptively aware of the doctrine thus enunciated and applied by the courts, 50 Am.Jur., Statutes, § 339, p. 331; *Exploration Company* v. *United States*, supra, 247 U.S. 435, 449; *United States* v. *McElveen*, supra, 177 F.Supp. 355, but as we shall demon-

strate in our consideration of the legislative history of § 4B, Congress had actual knowledge of and affirmatively evinced a purpose of having the principle read into the statute.

Considerable controversy exists as to the weight to be attached to limitation bills considered by the Congress prior to the enactment in 1955 of H.R. 4954 which became § 4B. The prior bills introduced in the 81st Congress, First Session and Second Session, the 82nd Congress and the 83rd Congress contained varying provisions, some relating to discovery. To recount and review these provisions and the hearings thereon would unduly and unnecessarily burden and prolong this opinion. The record which we cite discloses the contents of the prior bills and the related committee proceedings.[8]

In part defendants' legislative history argument is based on the premise that the failure of Congress to enact proposed discovery provisions which were included in some of the prior bills, compellingly demonstrates congressional intent that the doctrine of fraudulent concealment should not be read into § 4B. This argument necessarily encompasses the proposition that "'discovery" is synonymous in meaning to and must be equated with the doctrine of fraudulent concealment. Aside from the questionable import that the rejection of prior bills may have in determining congressional intent as to subsequently enacted

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[8] *Hearings Before Subcommittee of Senate Committee on the Judiciary*, 81st Cong., 1st Sess. [on S. 1910] Pts. 1 and 2 (1949) (S. 1910 is identical with H. R. 4985).

Hearings Before Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess. [on H. R. 7905] Ser. No. 14, Pt. 5 (1950).

House Report No. 2467, from Committee on the Judiciary, 81st Cong., 2d Sess. [to accompany H. R. 8763] (1950).

96 Cong. Record, 81 Cong. 2d Sess. (on H.R. 8763), pp. 10437-10444 (July 17, 1950).

Hearings Before Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 82nd Cong., 1st Sess. [on H. R. 3408] Ser. No. 1, Pt. 3 and Supp. to Pt. 3 (1951). (Identical with H. R. 1323).

82nd Cong., 1st Sess. [on H. R. 1986].

82nd Cong., 1st Sess. [on H. R. 109].

83rd Cong., 1st Sess. [on H. R. 467].

legislation, a question we do not further explore, we are satisfied that there is a marked difference in tolling the statute of limitations because of the failure to discover, and tolling the limitation period because the parties who engaged in unlawful conduct (conspiracy or combination) are successful through affirmative action, in concealing the cause of action itself.[9] This distinction was recognized and applied in *Burnham Chemical Co.* v. *Borax Consolidated*, supra, 170 F.2d 569, 577, where the court applied the California doctrine that "mere *failure* by a defendant to disclose to a plaintiff the existence of the facts does not constitute 'fraudulent concealment' of the cause of action unless a defendant is under a *duty* to disclose these facts, a situation not present in this case."

Dorberg v. *Dow Chemical Co.*, supra, 195 F.Supp. 337, 342, held explicitly that "concealment is different from a failure to discover." In the post § 4B cases, cited, infra, where the district courts have applied the fraudulent concealment doctrine and ruled that it tolled the statute, this same distinction was explicitly or implicitly recognized.

Moreover, the legislative history of § 4B and particularly the proceedings which occurred on the floor of the House of Representatives prior to its passage, furnishes

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[9] Fraudulent concealment comprehends two elements—the use of fraudulent means by the party who raises the ban of the statute and successful concealment from the injured party. In *Bailey* v. *Glover*, supra, 88 U.S. (21 Wall.) 342, the Supreme Court held the doctrine applicable when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the basis of the suit, and when the fraud has been concealed or is of such character as to conceal itself.

In Annotation, 173 A.L.R. 578 (1948), the author states: ". . . [T]he general trend of the decisions is in support of the rule that where a party against whom a cause of action has accrued in favor of another, by actual fraudulent concealment prevents such other from obtaining knowledge thereof, or the fraud is of such a character as to conceal itself, the statute of limitations will begin to run only from the time the right of action is discovered or, by the exercise of ordinary diligence, might have been discovered." Compare also *Burnham Chemical Co.* v. *Borax Consolidated*, supra, 170 F.2d 569; *Gaetzi* v. *Carling Brewing Co.* (E.D. Mich., S.D. 1962), 205 F.Supp. 615; *Dorberg* v. *Dow Chemical Co.* (E.D. Pa. 1961), 195 F.Supp. 337.

convincing proof that Congress itself recognized the difference between failing to discover and fraudulent concealment.

Representative Celler, Chairman of the Committee on the Judiciary which studied proposed antitrust legislation, and floor manager of H.R. 4954, was, by reason of his membership on the Judiciary Committee, throughly familiar with the prior unsuccessful bills above referred to, and was clearly cognizant of the body of decisions which had, with consistence, applied the fraudulent concealment doctrine to suspend limitation periods. During House consideration of H.R. 4954, Congressman Patman of Texas, a strong proponent of having a specific "discovery" clause written into the limitation provision, questioned Chairman Celler concerning the interpretation to be given to the bill. The following colloquy, found in Cong. Rec. H.R. 4954, 84th Cong. 1st Sess., 101 Cong. Rec. (1955), demonstrates that Congress had no intention of destroying the existing doctrine of fraudulent concealment:

101 Cong. Rec. 5129:

> "Mr. Patman: Does that 4 years apply to conspiracy cases? Suppose there is a conspiracy, and it is 10 years before the conspiracy is known.
>
> "Mr. Celler: In the case of conspiracy or fraud, the statute only runs from the time of discovery.
>
> "Mr. Patman: From the time of the discovery?
>
> "Mr. Celler: In conspiracy cases and cases of fraud.
>
> "Mr. Patman: And it is not the object or intention to change that at all?
>
> "Mr. Celler: That is correct."

Later, Chairman Celler was again called upon to construe the bill when Congressman Keating, speaking in favor of H.R. 4954, desired corroboration of an opinion he gave in answer to a question propounded by Mr. Patman.

101 Cong. Rec. 5130:

"Mr. Patman: Does the gentleman agree with the chairman that the 4-year limitation does not commence to apply in a conspiracy case until the conspiracy becomes known?

"Mr. Keating: I would want to have the law on that checked by the counsel for our committee. I have an impression that there have been decisions under the present conspiracy statute, which is not in any way interfered with by this legislation, to the effect that the statute of limitations does not begin to run until discovery of the conspiracy. But I would not want to make a positive assertion to the gentleman on that point without further investigation of the law.

"Mr. Patman: Notwithstanding the fact that the discovery was made years later?

"Mr. Keating: I would be happy to yield to the chairman of the committee, who may have investigated that precise point.

"Mr. Celler: Yes, I have. The statute only said from the time of discovery in that kind of case. The basis for my conclusion in that regard is the cases themselves. There are innumerable cases on that score.

"Mr. Keating: I am happy to have that enlightment."

Congressman Patman persisted in his effort to have a discovery provision written into the bill, but Chairman Celler firmly asserted the value of the implied fraudulent concealment doctrine as opposed to ordinary discovery.

101 Cong. Rec. 5132, 5133:

"Mr. Celler: The statute of limitations will start running from the time the action accrues, not from the time of discovery. If you make it time of discovery, then you practically have no statute of limitations at all. An action could have accrued and the

person aggrieved might not have heard of it for 20 years. Under the suggested amendment he would have a right to bring an action after 20 years, after the evidence will have been lost, and the defendant would be put in a rather deplorable situation in that regard. We provide that the 4-year statute shall start to run from the time of the accrual of damages, from the time the wrong was done, not from the time of discovery.

"Mr. Patman: Even in the case of fraud or conspiracy?

"Mr. Celler: No. In the case of fraud or conspiracy the statute of limitation only runs from the time of discovery.

"Mr. Patman: That is the point I wanted to make sure of. You are not attempting to change that particular part of it?

"Mr. Celler: Not at all."

Defendants would have us disregard the statements made by Chairman Celler and assert that debate on the floor of Congress cannot be used to determine the congressional intent. *Federal Trade Commission* v. *Anheuser-Busch, Inc.* (1960), 363 U.S. 536, 553; *Pennsylvania R. R. Co.* v. *International Coal Mining Co.* (1913), 230 U.S. 184, 198-199. We take no issue with these cases but hold them to be inapplicable where, as here, there are no countervailing considerations which tend to dispute the merit of the statements. When a statute is of doubtful meaning, consistent statements made by sponsors of legislation and committee chairmen are useful aids of interpretation. *Schwegmann Bros.* v. *Calvert Distillers Corp.* (1951), 341 U.S. 384. In 2 Sutherland, Statutory Construction, § 5012, pp. 503-04 (3rd Ed. 1943), it is stated:

"* * * As the committeeman in charge has the duty of defending the bill, he has familiarized himself with the situation sought to be remedied by the bill and his statements may be taken as the opinion of the committee as to what is meant by the bill.

"Courts have taken a realistic view of legislative

> procedure and have excepted from the general rule excluding the use of statements in debate of individual legislators as to the meaning of the bill, the statements of the member of the committee in charge of the bill. His remarks upon presenting the bill to the house (citing cases) and the answers made by him to questions asked by members (citing cases) will be considered by the courts in construing provisions of the bill subsequently enacted into law. These statements are in the nature of *supplemental committee reports and are entitled to the same weight accorded formal committee reports.* (citing cases)." (Emphasis supplied).

The statements of Congressman Celler are not rash, isolated opinions that are inconsistent with the legislative history, the prevailing committee reports, or the specific tolling provisions of § 5B of the Clayton Act (15 U.S.C.A. § 16b).[10] On the contrary, Mr. Celler's remarks are clarifying additions that reflect the careful diligence of a congressman who virtually lived with the problem during the course of several congressional sessions. A realistic appraisal of the circumstances justifies the attachment of weighty significance to Chairman Celler's statements, and to his expressed opinion that the prescription period would be suspended when there was fraudulent concealment which prevented discovery of the cause of action.

We have heretofore noted that prior to enactment of

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[10] § 5B, 15 U.S.C.A. § 16b, appearing in margin, footnote 4, supra, provides for a specific tolling provision during pendency of a Government action and for one year thereafter. Defendants argue that enactment of § 5B bears strongly upon the intent of Congress with regard to § 4B. They contend that if Congress intended that fraudulent concealment would operate to suspend the four-year period, it would have so provided by writing such an exception into the statute. This result does not necessarily follow. The doctrine of fraudulent concealment had become firmly imbedded as a part of our federal jurisprudence at the time these statutes were enacted, and, as we have shown, it was plainly the intent of Congress that this doctrine should constitute an implied exception to § 4B. In order, however, to toll the period of limitations during pendency of Government proceedings, it was necessary for Congress to so provide by writing such an exception into the law.

§ 4B the fraudulent concealment doctrine received judicial sanction in antitrust cases. Since such enactment, the doctrine and its effect upon § 4B has been considered and ruled upon by at least seven United States District Courts in cases involving the same general factual circumstances here present and that originally precipitated the Government's action against the electrical companies. Four courts have ruled that fraudulent concealment suspends the time period: *Atlantic City Electric Co. v. General Electric Co.* (S.D.N.Y. 1962), 207 F.Supp. 613; *United States and Tennessee Valley Authority v. General Electric Co.* (E.D. Pa. 1962); *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.* (N.D. Ill., E.D. Aug. 28, 1962); and *Public Service Co. of Colorado v. Allen-Bradley Co., Allis-Chalmers Manufacturing Co. et. al.* (D. Colo. 1962). Three, including the court from which these appeals come, have taken the opposite view: *Brigham City Electric Corp. v. General Electric Co.* (D. Utah 1962), No. C-16-62; *Public Service Co. of New Mexico v. A. B. Chance Co.* (D. N.Mex. 1962); and *City of Kansas City, Missouri, v. General Electric Co.* (W.D. Mo. 1962).[11]

The Second Circuit in *Maricopa Limited v. Eastman Kodak Co.*, supra, 288 F.2d 89, cert. den. 368 U.S. 821, held the doctrine was applicable in an antitrust case where the New York statute of limitations was used as a measuring period. There, the cause of action accrued long prior to the enactment of § 4B and plaintiff's action was barred unless the time limit had been suspended because of fraudulent concealment. Since New York law did not recognize the doctrine and since the district court felt that the federal concealment rule was inapplicable, it held the action was barred. On appeal, the Court, speaking through Judge Friendly, held:

> "'We hold that the federal rule as to the effect of concealment on the running of a period of limitation

[11] In addition to the electrical cases, other recent decisions have construed § 4B to allow tolling of the limitation period for fraudulent concealment: *Dorberg v. Dow Chemical Co.*, supra, 197 F.Supp. 337; *Gatti v. Carling Brewing Co.*, supra, 205 F.Supp. 615.

> applies to an action for treble damages under the Clayton Act *even* when a state statute is used to measure the period; but we affirm on the ground that the complaint does not contain allegations sufficient to bring plaintiff within this federal rule." 288 F.2d at p. 83. (Emphasis supplied).

The Court indicated that while it could dispose of the appeal on the basis of the insufficiency of the complaint, it deemed it proper to deal also with the important question of law decided by the district court, inasmuch as the issue had been fully argued, there was a conflict in the decisions of the Southern District of New York, and the problem was likely to recur.

Defendants challenge the authoritativeness of *Moviecolor*, asserting that the portion of the opinion dealing with the question of fraudulent concealment is dictum. Apparently the same position was taken by the defendants in *Atlantic City Electric Co.* v. *General Electric Co.*, supra, 207 F.Supp. 613. Judge Feinberg was of a different view. See 207 F.Supp. at 617. At 207 F.Supp. 618, the Judge stated:

> "*Moviecolor* makes abundantly clear the view of the Court of Appeals that fraudulent concealment applies to Section 4B. It is this view which defendants say is *dictum* and may, therefore, be disregarded. Whether that view is *dictum* is questionable, since I believe it was an essential element in the process of decision. But, in any event, even if it is *dictum*, its controlling effect is undiminished."

Regardless of how the challenged portion of the opinion may be characterized, we are satisfied that it constitutes a sound exposition of the law, and that in the view of the Second Circuit, the limitation period of four years is not absolute but is subject to the well-settled doctrine of fraudulent concealment.

As an adjunct to their principal contention that legislative history reveals that Congress intended the statute to be absolute in its terms, defendants also argue in their

brief that § 4B is a substantive statute of limitations and therefore limits a right which cannot be tolled by reading into it the fraudulent concealment doctrine.[12] Authority for defendants' position may be found in many cases in which the decision was to be based upon a rigid interpretation of the statute of limitations.[13] Thus, it has been held that where a statute creates a cause of action that did not exist before and at the same time establishes a period of limitations within which it must be brought, the running of the statute of limitations destroys the very right itself and thus cannot be tolled for any reason. In *Adams* v. *Albany* (S.D. Cal., N.D. 1948), 80 F.Supp. 876, the district court stated:

> "In fraud, the statute of limitations does not begin to run until after discovery. In a statute creating liability, the period for the institution of the action cannot be . . . overcome by allegations of fraud or concealment which prevented discovery." 80 F.Supp. at p. 881.

Against this contention, the argument is made, (1) that the statute is procedural, and (2) that the courts have rejected the substantive-procedural approach with all of its rigid characteristics. We are strongly impressed with the assertion that the statute is procedural. The very fact that the limitation period was added forty-one years

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[12] Defendants rely upon a theory first propounded in *The Harrisburg* (1886), 119 U.S. 199, a case in which the court strictly enforced a one-year statute of limitation where no excuse was offered to show why there had been a delay in bringing suit. The court stated:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." 119 U.S. at p. 214.

[13] *Texas Cement Co.* v. *McCord* (1914), 233 U.S. 157; *Davis* v. *Mills* (1904), 194 U.S. 451; *Pollen* v. *Ford Instrument Co.* (2 Cir. 1940), 108 F.2d 762.

after the enactment of the Clayton Act is indicative that § 4B was not part of a legislative scheme creating a right.[14] Enacted for the avowed purpose of bringing ordered uniformity out of choas,[15] § 4B was a substitute for the admittedly procedural state statutes of limitations which could not have been borrowed in enforcement of a federal right if they were substantive. We are also mindful of the discussion on the floor of the House of Representatives as to the effect the statute would have upon pending suits. While not conclusive, we deem this colloquy of sufficient significance to set forth the pertinent part thereof, found in 101 Cong. Rec., 84th Cong. 1st Sess., p. 5131 (1955):

> "Mr. Murray of Illinois: Then am I correct in assuming that this limitation provided by this amendment is strictly a procedural limitation and has nothing to do with substance?
>
> "Mr. Quigley (a member of the House Judiciary Committee): It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose."

While we believe that the controlling factor in determining whether the statute should be tolled for fraudulent concealment is congressional intent, irrespective of

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[14] Brushing off the fact that the limitation period was added forty-one years after passage of the Act, defendants assert that the ruling of *The Harrisburg*, supra, applies even if the statute of limitations is in a separate statute from the one that creates the right. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.* (1943), 320 U.S. 356; *Davis* v. *Mills*, supra, 194 U.S. 451.

[15] See, H. R. Rep. No. 422, 84th Cong., 1st Sess. [to accompany H.R. 4954] pp. 1, 6, 7 (1955); S. Rep. No. 619, 84th Cong., 1st Sess. [to accompany H.R. 4954] pp. 1, 4, 5 (1955); 101 Cong. Record, 84th Cong. 1st Sess., p. 5129 (1955).

the doubtful procedural-substantive dichotomy,[16] if such a classification is significant, it is our view that the evidence supports plaintiff's contention that § 4B is procedural.

However, we are firmly convinced that even if § 4B is "substantive," the fraudulent concealment doctrine is applicable thereto. Congressional intent overrides any technical and conceptualistic approach. As stated in *Scarborough* v. *Atlantic Coast Line R. Co.*, (4 Cir. 1949), 178 F.2d 253:

> "We cannot see a distinction and a difference, so clear and so real, between the two classes of statutes of limitations—the remedial and the substantive—as to justify the courts in fully giving effect to fraud in tolling the statute in one type (remedial) and then flatly denying that effect to fraud in the other type (substantive). The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitations." 178 F.2d at p. 259.

In *Glus* v. *Brooklyn Eastern District Terminal* (1959), 359 U.S. 231, a case involving "estoppel" rather than fraudulent concealment, the Supreme Court held that the "substantive" statute would be tolled by defendant's wrongful acts.[17] An examination of the legislative history demon-

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[16] In the course of oral argument in this Court, Mr. Blackmar, counsel for defendants, stated: "We agree with Mr. Wilson's (counsel for plaintiff) statement of the issue. The question is whether Section 4B of the Clayton Act can be tolled under any kind of a claim of concealment, fraudulent concealment, concealed conspiracy, however you would phrase it. We submit this question absolutely. It was the question ruled by Judge Becker and by the other courts.

"We also agree with the statement of Mr. Mauer (counsel for plaintiff) that the question for the Court to decide is the question of *legislative intent.*" (Emphasis supplied).

[17] See also Anno., 15 A.L.R. 2d 500, 502 (1951), wherein the writer concludes that there is a definite conflict of authority as to whether a "substantive" statute may be tolled because of fraudulent concealment.

strates to us that Congress, acting within its authority, intended that the maxim that no man may take advantage of his own wrong should be read into § 4B. "Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. at pp. 232, 233.

We have also considered the policy arguments advanced by defendants. They say that engrafting the fraudulent concealment doctrine on § 4B will recreate the very confusion and chaos which Congress sought to eliminate. Additionally, they assert that because of the large volume of antitrust cases growing out of the electrical conspiracies and combinations, the ability of the courts to efficiently function and to expeditiously dispose of litigation may be impaired and that Congress was aware of this danger when § 4B was enacted.

These arguments fade into insignificance in the light of other considerations. We are not aware of past confusion or chaos in the federal courts resulting from application of the fraudulent concealment doctrine to antitrust actions, or for that matter to other litigation. It is to be remembered that while a plaintiff may by proper allegations of fraudulent concealment initially avoid the time limitation bar of § 4B, it remains for the plaintiff to support such an allegation by competent and probative evidence. If plaintiff fails to carry the burden in this respect, the judicial processes are such as to insure orderly and efficient administration of justice, e.g., *Moviecolor Limited* v. *Eastman Kodak Co.*, supra, 288 F.2d 80; *Burnham Chemical Co.* v. *Borax Consolidated*, supra, 170 F.2d 569; *Gaetzi* v. *Carling Brewing Co.*, supra, 205 F.Supp. 615; *Dovberg* v. *Dow Chemical Co.*, supra, 195 F.Supp. 337.

While lack of uniformity in the state statutes of limitations was undeniably a prime factor which motivated Congress to enact § 4B, our careful consideration of all phases of the instant controversy drives us irresistibly to the conclusion that Congress was equally concerned with efficient enforcement of the Clayton Act which certainly

cannot be accomplished if the statute is given a literal construction. We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized.

In summary, we hold that the fraudulent concealment doctrine is to be read into the statute of limitations so that under circumstances here allegedly present, the limitation period begins to run from the time that plantiff by the exercise of reasonable diligence, discovers or should have discovered the cause of action. This holding requires that the judgments of dismissal be reversed and that the causes be remanded for further proceedings.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Filed November 6, 1962. Robert C. Tucker, Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17117

September Term, 1962

CITY OF KANSAS CITY, MISSOURI, A MUNICIPAL CORPORATION, *Appellant*,

vs.

FEDERAL PACIFIC ELECTRIC COMPANY, *Appellee*.

Appeal from the United States District Court for the Western District of Missouri

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here Ordered and Adjudged by this Court that the judgment of dismissal of the said District Court in this cause be, and the same is hereby reversed with costs, and that the City of Kansas City, Missouri, a Municipal Corporation, have and recover against the Federal Pacific Electric Company, the sum of Two Hundred Sixty-two and 90/100 ($262.90) Dollars for its costs in this behalf expended and have execution therefor.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court this day filed herein.

November 6, 1962.

Entered in accordance with opinion:

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.